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No. 09-51

Supreme Court, U.S.
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In The
# Supreme Court of the United States

RICHARD SINGLETON,

*Petitioner,*

v.

STATE OF FLORIDA,
DEPARTMENT OF JUVENILE JUSTICE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Respondent State of Florida, Department of Juvenile Justice adopts the Petitioner's Questions Presented, as follows:

> Whether the trial court improperly instructed the jury on the plaintiff's burden in the case involving racial discrimination in employment.

## PARTIES TO THE PROCEEDINGS

Respondent State of Florida, Department of Juvenile Justice adopts the statement of the List of Parties in the Petition, as follows:

RICHARD SINGLETON, *Petitioner*

STATE OF FLORIDA, DEPARTMENT OF JUVENILE JUSTICE, *Respondent*

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that is the subject of this petition is unpublished and appears at Appendix A to Respondent's Brief in Opposition.

## STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit were entered on May 15, 2009. Petitioner filed a certiorari petition on July 10, 2009. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1) to review the final judgment entered on May 15, 2009.

## STATEMENT OF THE CASE

### I. Procedural History

The Petitioner, Richard Singleton, filed this action on February 13, 2006, in the Second Judicial Circuit for Leon County, Florida and the case was subsequently removed to federal court on March 2, 2006, by the Respondent, State of Florida, Department of Juvenile Justice. (R-1). The complaint alleged violations of 42 U.S.C. § 2000e et seq. against the Respondent. (R-1). The Defense filed its Answer and Affirmative Defenses on March 10, 2006. (R-4). On August 8, 2006, Erika Bush filed a Notice of Appearance on behalf of the Plaintiff. (R-12).

The case was first set for trial on February 20, 2007, (R-36), but was continued until June 11, 2007, on request of the Plaintiff. (R-47, R-50). On June 4, 2007, the Plaintiff's counsel filed an Emergency Motion to Withdraw as Attorney for the Plaintiff, (R-79), which was granted the following day by the trial judge, canceling the scheduled trial. (R-85). The Plaintiff was given until August 6, 2007, to find a new attorney. (R-85). On July 13, 2007, Gary Printy filed a Notice of Appearance on behalf of the Plaintiff. (R-89). The trial was set for December 10, 2007, (R-97), but on November 8, 2007, the trial was again continued. (R-105). Jury trial was re-set for May 12, 2008. (R-110). The trial lasted for three days and the verdict was entered on the fourth day. (R-127).

The district court provided clear and detailed charges to the jury, including charges on the race discrimination claim and burden of proof. (R-146-140-149). The source of these instructions was the Eleventh Circuit's pattern jury instructions (Civil Cases), 11th Cir. Federal Claims Instructions ("FCI") 1.2.1, with minor changes. (R-124-1). The jury returned a verdict for the defendant. (R-127-1).

On June 2, 2008, a Notice of Appeal was filed in the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit heard the same argument to prove the same question Petitioner presents here. On May 15, 2009, the Eleventh Circuit entered judgment for the Appellee and later issued the mandate on June 16, 2009. This petition was filed on July 10, 2009 by

Petitioner, Richard Singleton and docketed July 15, 2009.

## II. Facts Relevant to the Petition

The Petitioner, Mr. Richard Singleton, began his employment with the Department of Juvenile Justice (hereinafter "DJJ") as the Superintendent of the Jackson Juvenile Offender Correction Center (hereinafter "J-JOCC") in Jackson County, Florida, in June, 1999, (R-145-35). The Petitioner was terminated on July 6, 2004, pursuant to an incident that occurred on the premises of the J-JOCC facility on June 28, 2004, where the Petitioner placed his hands on a young African-American female kitchen worker without her permission (R-145-46, 56). The victim, Della Barnes, was not an employee of the Department, but instead was an employee of Trinity Food Services that the Department contracted with to provide kitchen services. (R-146-12). In response to the incident, Ms. Barnes filed a criminal police report, alleging battery. (R-146-17-19). Because Mr. Singleton was charged with a violation of state criminal law, the Assistant Secretary of DJJ, Charles Chervanik, and others with decision-making authority made the decision to terminate his employment with the department. (R-145-178). Mr. Singleton testified on his behalf and, when cross-examined, he stated that he did touch Ms. Barnes and he knew that this was inappropriate. (R-145-96). Furthermore, Mr. Singleton testified that he was aware of department policies which permitted any

DJJ employee to be terminated due to a violation of criminal law. (R-145-96).

During the defense's case in chief, two African-American supervisors of DJJ juvenile corrections facilities testified. Ed Leeks testified that he was asked to take over the position of superintendent of J-JOCC immediately after Mr. Singleton was terminated. (R-145-158-59). Oliver Jones testified that he never experienced any discriminatory behavior while employed with DJJ. (R-145-166-67).

Appellant had opportunities to object to the trial court's proposed jury instruction, suggest modifications, or submit his own instructions. On May 25, 2007, Plaintiff filed what was denominated as "Plaintiff's Requested Jury Instruction No. 1, Title VII – Civil Rights Act Race Discrimination; Including Same Decision Defense." (R-61).

On the first day of trial, the district court furnished detailed jury instructions to both counsel for Plaintiff and Defendant and requested that attorneys for both sides submit changes or modifications.[1] (R-144-9-10).

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[1] The trial court stated:

> I have a verdict form and instructions. Have both sides had an opportunity to review the instructions and the verdict form? She is going to give them to you, and look them over after we recess this evening and let me know if you would like to request any changes or modifications.

On the second day of trial, the district court asked counsel for both sides whether each had an opportunity to review the jury instructions.[2] (R-145-8). Subsequently, the district court asked whether either party had any changes or modifications to the jury instructions and the Plaintiff indicated he did not, as did Defendant.[3] (R-145-9).

On the third day of trial, the district court informed the parties "Counsel, it will be the Court's intention to read the set of instructions to the jury upon their return and review the verdict form with them and send them out to deliberate." (R-146-139). Whereupon, the district court proceeded to distribute copies of the jury instructions and verdict form and read both to the jurors. (R-146-140-149). The jury instruction read to the jurors were the same instructions distributed to counsel for the parties on the first day of trial. (R-124). The following day, the jury returned with the verdict in favor of the Defendant-Appellee.

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[2] THE COURT: . . . Have each of you had the opportunity to review the jury instructions and the verdict form? The Plaintiff?

MR. PRINTY: Yes, Your Honor.

[3] THE COURT: Any changes or modifications?

MR. PRINTY: No objections, changes or modifications.

MR. HOWELL: No objections, Judge.

## III. The Opinions Below

The jury verdict returned on May 15, 2008 showed that the jury did not find, from a preponderance of the evidence, that the fact that the Plaintiff is black was a substantial or motivating factor that prompted the Defendant to fire Plaintiff. This finding precluded the evaluation of further issues put before the jury on the verdict form. Essentially, no change in the jury instructions would create a different result because Plaintiff did not sufficiently prove the essential first point of law, that the DJJ was motivated by Petitioner's race.

On appeal to the Eleventh Circuit, the sole question presented was whether the trial court improperly instructed the jury as to the Plaintiff's burden of proof. The court reviewed the case for plain error only because it is entirely undisputed that no objections were made to the jury instructions at trial. *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). The Court, in the opinion dated May 15, 2009, stated that:

> "reversal for plain error will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice." Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329-30 (11th Cir.1999). To demonstrate that jury instructions were plainly erroneous, an appellant must prove that the challenged instruction was an incorrect statement of the law, misled the

> jury, or left the jury to speculate as to an essential point of law. Id.

In its evaluation of the arguments asserted by the appellant, the court found that the jury instructions did not misstate the law or mislead the jury because they simply instructed the jury to examine the motives and actions of the "defendant." This was not a misstatement of the law because it did not create an impression that only upper management's motives were to be considered, but rather the entire DJJ including all relevant employees.

As for the argument that the jury was left to speculate on an essential point of law, the court held that, "Singleton has not pointed to, and we cannot find, any case law deeming evidence of other discriminatory acts an 'essential' part of proving discriminatory termination." The Eleventh Circuit found no plain error in its review of the case and held that the jury instructions were not a miscarriage of justice.

## ARGUMENT

### CERTIORARI IS NOT WARRANTED BECAUSE PETITIONER FAILED TO OBJECT TO THE JURY INSTRUCTIONS BEFORE APPEAL AND THE DISTRICT COURT SUFFICIENTLY INSTRUCTED THE JURY ON PLAINTIFF'S BURDEN OF PROOF FOR HIS CLAIM

Petitioner, Richard Singleton, seeks a writ of certiorari from the May 15, 2009 opinion of the Eleventh Circuit affirming the district court judgment in favor of Respondent, State of Florida Department of Juvenile Justice. Petitioner presents one question, whether the jury instructions given by the trial court improperly instructed the jury on the Plaintiff's burden. This question was presented to the Eleventh Circuit as well but the trial court never heard an objection to the instructions which means the Petitioner failed to preserve the issue for appeal.

Petitioner draws attention away from the single issue presented which is if the jury instructions used at trial improperly instructed the jury on the burden of proof for the Plaintiff. The jury instructions were plainly written, tracked the Eleventh Circuit's pattern jury instructions, and were not a misstatement of law. Other alleged discriminatory acts are not an essential element to prove racial discrimination in this case. Proposing new jury instructions on appeal is not the proper time to raise such an issue. Petitioner took too long to realize he had concerns about the jury instructions and should be barred from

any relief under Rule 51 of the Federal Rules of Civil Procedure.

Dissatisfaction with the verdict does not allow a party to challenge the jury instructions on appeal. This Court has said that it will not ordinarily "decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 259 (1987). Also, this rule has "special force where the party seeking to argue the issue has failed to object to a jury instruction." *Id.* On appeal to the Eleventh Circuit, it was undisputed that no objections to the trial court's jury instructions were made. (R-145-9) On two separate days, both Plaintiff and defendant were given a chance by the court to object to the jury instructions.

This is not a case where Plaintiff requested a jury instruction that the trial court refused to give. It is a case where Plaintiff never even made an objection or requested modification.

A clear and concise reading of the trial transcript from May 13, 2008, the second day of trial, shows Plaintiff's counsel had no objections, changes or modifications to the trial judge's instructions:

> THE COURT: Have each of you had the opportunity to review the jury instructions and the verdict form? The Plaintiff?
>
> MR. PRINTY: Yes, Your Honor.
>
> THE COURT: Any changes or modifications?

> MR. PRINTY: No objections, changes or modifications.
>
> MR. HOWELL: No objections, Judge.

(R-145-8-9). Plaintiff was offered another chance to object to the jury instructions on May 14, 2008, the third day of trial:

> THE COURT: All right. I went through the jury instructions and we re-arranged one, and I asked my law clerk to give you the revised set. Have you received it?
>
> MR. PRINTY: Yes, Your Honor.
>
> MR. HOWELL: Yes, Your Honor.
>
> THE COURT: Any problems with that?
>
> MR. HOWELL: None from the defendant.
>
> MR. PRINTY: I didn't see any problems, Your Honor.
>
> THE COURT: All right. Well, that will be the Court's instructions to the jury.

(R-146-5-6).

Petitioner provides jury instructions in his argument, but this adds nothing to the argument of whether the jury instructions used were improper. The time to propose new jury instructions was at trial, when the court gave multiple opportunities to do so. The procedural history above shows that the trial date was postponed several times. Petitioner cannot reasonably make the argument that there was

not enough to prepare his own jury instructions or that he did not have enough time to review the instructions provided by the court.

Petitioner presents this Court with the sole task of evaluating whether the trial court improperly instructed the jury on the Plaintiff's burden. Petitioner contends that the instructions should have specified precisely whose motives should be considered in the evaluation by the jury. The Eleventh Circuit held that the language used in the jury instructions was not misleading because they instructed the jury to consider the motives of "the defendant" and "explained that a governmental agency defendant, like the JDD [sic] was responsible for any acts or statements of its employees." (Appendix A). This clearly and plainly instructs the jury to consider any employee, not just upper management as the Petitioner contends.

Petitioner asserts next that the jury was left to speculate on an essential point of law because he presented evidence at trial of other discriminatory acts by Respondent. Petitioner, in his own argument, describes the burden shifting method for discrimination cases and the requirements to prove a discriminatory termination, but nowhere is it described that other discriminatory acts are an essential element. The Eleventh Circuit held that, "Singleton has not pointed to, and we cannot find, any case law deeming evidence of other discriminatory acts an "essential" part of proving discriminatory termination." (Appendix A).

Finally, even if Petitioner's new proposed jury instructions permitted, it is doubtful they would have any effect on the outcome of the case. The jury found that the race of Petitioner was not a substantial or motivating factor in his termination. This finding kept the jury from having to move forward with the analysis of the issues. Clearly, changing the jury instructions would not have changed the outcome because all issues dependent on that first decision by the jury would have been moot. The jury was given time during trial to evaluate the testimony of witnesses, including former Assistant Secretary of DJJ, who testified that Richard Singleton was terminated due to a violation of criminal law, (R-145-178), and that race was not a factor in this determination. The jury heard this testimony, weighed the issues and facts presented during trial, and made a decision in favor of the State of Florida Department of Juvenile Justice. This result was based on the jury applying a proper statement of law to evaluate the facts of the case and a different outcome would not have resulted even with Petitioner's proposed jury instructions.

## CONCLUSION

For the reasons set forth in the foregoing pages, the petition for writ of certiorari should be denied.

Respectfully submitted,

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**APPENDIX A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 08-13238
Non-Argument Calendar

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D. C. Docket No. 06-00107-CV-4-SPM

RICHARD SINGLETON,

Plaintiff-Appellant,

versus

STATE OF FLORIDA
DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Florida

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(May 15, 2009)

Before BIRCH, HULL and FAY, Circuit Judges.

PER CURIAM:

Richard Singleton, a black man, appeals the judgment in favor of the State of Florida Department of Juvenile Justice ("DJJ") on his claim that employees of the DJJ terminated him from his position

as superintendent of a juvenile justice facility because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Singleton argues that the jury instructions were plainly erroneous because they misled the jury and left the jury to speculate on an essential point of the law. For the reasons set forth below, we affirm.

## I.

At trial, the district court used Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1 and instructed the jury, in pertinent part, as follows:

> In this case the plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's race.
>
> More specifically, the plaintiff claims that he was demeaned, unfairly scrutinized and ultimately discharged from employment by the defendant because of his race. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

The defendant denies that the plaintiff was discriminated against in any way and asserts that all actions taken and decisions made were for legitimate non-discriminatory reasons and that if any actions or decisions included discriminatory motives, the same actions and decisions would have been taken anyway.

In order to prevail on his claim, the plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the plaintiff was discharged from employment by the defendant; and.

Second: That the plaintiff's race was a substantial or motivating factor that prompted the defendant to take that action.

. . .

. . .

On the other hand, it is not necessary for the plaintiff to prove that the plaintiff's race was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves that race was a determinative consideration that made a difference in the defendant's decision.

If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would not have been discharged for other

> reasons even in the absence of considerations of the Plaintiff's race. If you find that the Plaintiff would have been dismissed for reasons apart from the Plaintiff's race, then you will make that finding in your verdict.

The jury returned a verdict finding that "the fact that [Singleton] was black was [not] a substantial or motivating factor that prompted the Defendant to fire [him]."

## II.

When the parties do not dispute that the appellant failed to object to the jury instructions before the jury's deliberations, as here, we review the jury instructions for plain error only. *See United States v. Massey,* 89 F.3d 1433, 1442 (11th Cir.1996). Under plain error review, we may correct an error if we finds (1) an error, (2) that is plain, (3) that affected the appellant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Rodriguez,* 398 F.3d 1291, 1298 (11th Cir. 2005). Specifically regarding jury instructions, "[p]lain error review is an extremely stringent form of review" and "reversal for plain error will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice." *Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1329-30 (11th Cir.1999). To demonstrate that jury instructions were plainly erroneous, an appellant must prove that the challenged instruction was an incorrect statement of the

law, misled the jury, or left the jury to speculate as to an essential point of law. *Id.* The incorrect statement must have been so prejudicial as to affect the outcome of the proceedings. *Id.*

## III.

Although Singleton does not argue as much, we initially note that, in all relevant aspects, the jury instructions were not a misstatement of law, as they tracked the language of the Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1. *See Farley,* 197 F.3d at 1329-30. Although the final paragraph of instructions above contains an error, in that the district court should have instructed, "You must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff *would* have been discharged for other reasons even in the absence of considerations of the Plaintiff's race," this error did not affect the outcome of the trial because the jury found that Singleton had not shown that his race was a factor in his termination and, therefore, never reached the part of its analysis that required determining whether the DJJ would have made the same decision even were it not motivated by his race. *See* Eleventh Circuit Pattern Jury Instructions (Civil), 1.2.1; *Farley,* 197 F.3d at 1329-30.

Singleton first argues that the jury instructions misled the jury. He explains that he presented evidence that John Tallon, his supervisor, recommended to upper management that Singleton be fired and

that upper management merely "rubber stamped" Tallon's recommendation. He asserts that the jury instructions did not inform the jury that it must consider the discriminatory motives of *all* decision-makers, rather than simply the final decision-makers, and created the impression that the jury should find in favor of the DJJ if it found that upper management was not itself racially motivated, even if it believed that Tallon was himself motivated by race. However, the jury instructions instructed the jury that it must determine whether the plaintiff's race motivated "the defendant," or the JDD, and explained that a governmental agency defendant, like the JDD, was responsible for any acts or statements of its employees. Therefore, the jury instructions did not plainly create an impression that upper management's motivations were all that mattered for deliberation. Instead, the jury instructions adequately advised the jury that its deliberations should include the motivations of any relevant employee.

Singleton next argues that the jury instructions left the jury to speculate on an essential point of law. Singleton explains that he presented evidence that Tallon also demoted another black employee because of that employee's race. Singleton asserts that the jury should have been instructed to consider the role that race played in Tallon's decision to demote that other black employee as evidence that he acted in a similar manner in recommending Singleton's termination. However, Singleton has not pointed to, and we cannot find, any case law deeming evidence of

other discriminatory acts an "essential" part of proving discriminatory termination. Therefore, any error in this regard was not plain. *See Rodriguez,* 398 F.3d at 1298. Accordingly, because the jury instructions were not a miscarriage of justice, we affirm.

**AFFIRMED.**